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In the Supreme Court of the United States

OCTOBER TERM, 1942

No. 709

VIRGINIA ELECTRIC AND POWER COMPANY,
PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD

OPINIONS BELOW

The opinions of the court below (S. R. 62–78)[1] are reported in 132 F. (2d) 390. The findings of fact, conclusions of law, and order of the Board (S. R. 13–62) are reported in 44 N. L. R. B. 404.

[1] Throughout this brief we have followed the same method of referring to the record as is used by the Company in its brief. "R" refers to the printed transcript of record heretofore filed in this Court, when this case was previously before the Court, October Term, 1941, Nos. 25 and 26; "S. R." refers to the printed transcript of record filed in this Court containing the principal proceedings had subsequent to the filing of the transcript of record in this Court in the earlier proceeding.

JURISDICTION

The decree of the court below was entered on December 9, 1942 (S. R. 78–79). The petition for a writ of certiorari was filed on February 4, 1943, and was granted on March 15, 1943. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925, and under Section 10 (e) and (f) of the National Labor Relations Act.

QUESTIONS PRESENTED

1. The Board found that the petitioner dominated, interfered with, and supported a labor organization of its employees, entered into an agreement with that organization providing for a closed-shop and check-off of dues for the purpose of securing that organization's financial stability, and coerced its employees to authorize the check-off by making it a condition to retaining their jobs, thereby committing unfair labor practices in violation of Section 8 (1) and (2) of the Act. The question is whether in these circumstances the Board properly required the petitioner to reimburse its employees for the sums of money which the petitioner deducted from their wages and paid over to the dominated labor organization as their dues.

2. Whether there is substantial evidence to support the Board's findings of fact that petitioner dominated, interfered with, and supported a labor organization of its employees. This question is

presented only to the extent, if any, that may be pertinent to examination of the first question.

STATUTE INVOLVED

The pertinent provisions of the National Labor Relations Act are set forth in the Appendix, *infra*, pp. 45–46.

STATEMENT

On February 27, 1940, the Board, after the usual proceedings, issued an order against the Virginia Electric and Power Company, herein called the Company (R. 952–980). Upon petitions by the Company and by The Independent Organization of Employees of the Virginia Electric and Power Company, herein called the I. O. E., to review and set aside the Board's order, the court below, in an opinion issued on November 12, 1940 (115 F. (2d) 414), set aside and refused to enforce the order (R. 1005–1019). Thereafter, this Court granted writs of certiorari and in an opinion issued on December 22, 1941 (314 U. S. 469), reversed the decision of the court below and directed that the cause be remanded to the Board for a redetermination of the issues in accordance with the opinion of this Court (S. R. 1–10). Upon the remand of the case, a wholly reconstituted Board reconsidered the entire case upon the original record and on September 24, 1942, issued a new decision (44 N. L. R. B. 404) containing its findings of fact, conclusions of law, and order (S. R. 13–62).

Petitioner has attacked the Board's findings that it dominated and interfered with the formation of the I. O. E. only to the extent that such findings are pertinent to the portion of its order requiring the reimbursement of the dues checked off by petitioner for the I. O. E.[2] The basis for the order of reimbursement, however, lies in petitioner's entire course of conduct resulting in the establishment and recognition of the I. O. E. by the Company. Indeed, the Board expressly predicated the provision in its order for repayment of the checked off dues upon "the particular circumstances of this case" (S. R. 54–55). Thus, all of the findings and evidence which relate to the Company's interference with the employees' choice of representatives and its support of the I. O. E. provides the background upon which the Board based its order of reimbursement. This evidence is summarized in this Statement; the evidence bearing directly upon the effect of the check-off provision is treated in the Argument, *infra*, pp. 26–29.

The facts as found by the Board and shown by the evidence may be summarized as follows:[3]

The Company's hostility to self-organization.—From 1922, when the Norfolk, Richmond and

[2] The Company has complied with the other portions of the Board's order. See p. 19, *infra*, and petitioner's brief, p. 10, and S. R. Vol. 2 (unprinted) pp. 53–62.

[3] In the following discussion the citations preceding the semicolons are to the Board's findings and the succeeding references are to the supporting evidence.

Portsmouth street car operators lost a strike for the renewal of a preexisting contract with the Company, until 1937 the Company's employees remained totally unorganized (S. R. 22; R. 34–35, 78, 198, 328–331).[4] Following the enactment of the N. I. R. A. in 1933,[5] the Company issued a statement announcing that the Company's "past policy" of regarding collective bargaining as "entirely unnecessary" was still operative (S. R. 22–23; R. 427, 886),[6] and hired a labor spy through the Railway Audit and Inspection Company. to keep Superintendent Bishop of the transportation department at Norfolk informed of any union activity among the Company's employees (S. R. 23, 36; R. 56–59, 331–333, 370, 198–201). The employment of this labor spy continued for 2 years after the adoption of the Wagner Act (S. R. 23, 36, 41–42; R. 56–59, 331–

[4] The record shows that the Company's treatment of the strikers in 1922 was cited to the employees in 1937 to convince them that they should go along with the Company's wishes and join the I. O. E. rather than risk such losses as befell those who incurred the Company's wrath by joining an outside union (R. 78, 198; cf. R. 64, 82–83, 93, 160, 172, 185–186). Vice-President Jones himself admitted at the hearing that the Company's history of anti-unionism had been so strong that there were probably employees "afraid to join" a union (R. 347–348).

[5] Section 7 (a) of the National Industrial Recovery Act, 48 Stat. 195, assured employees the right to organize.

[6] Holtzclaw, the Company's president, testified at the hearing in this case that "there never was any modification made" in this policy (R. 428).

333, 370, 198–201).[7] In 1936, upon learning that employees were showing an interest in unions, Superintendent Bishop undertook to supplement the information furnished by his undercover operative, by himself calling various of the employees to his office and questioning them concerning their knowledge of and participation in labor activities (S. R. 23–24, 36; R. 93, 400, 820–821).

Formation of the I. O. E.—The A. F. of L. initiated efforts to organize the Company's employees in March 1937 (S. R. 24; R. 428–429).[8] The C. I. O.

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[7] The Company's use of espionage was brought home to the employees by statements of supervisors. Thus when Dispatcher Caton, a supervisory employee under Superintendent Bishop, greeted the appearance of Bolton in his office with "Here comes another C. I. O. man. He won't be here long," Bolton, who had joined the union, fearful of his job, denied his membership. Thereupon Dispatcher Caton replied, "Oh, yes, you are. I have a list of the names" (R. 160). Superintendent Bishop's son Warren, in the spring of 1937 boasted to one of the employees, Reutt, "that the Company had one of the smartest labor spies of any time" (R. 76). The labor spy posed as an energetic advocate of unionism, on one occasion openly supporting a strike at a Norfolk garment factory, addressing the strikers over a loud-speaker system. He was accepted by union officials and members alike as a sympathizer with organized labor when he attended meetings of the Norfolk Central Labor Union (S. R. 23; R. 198–201, 399–400). As the Board pointed out in its decision, this operative followed "the typical technique of the labor spy" (S. R. 23).

[8] At the opening of its drive, the A. F. of L. organizer telephoned a company superintendent, Davis, to ask for an appointment to discuss organization of a group of Norfolk employees; Davis informed his superiors of the call and

commenced organizing activities about the middle of April 1937 just after the Supreme Court sustained the constitutionality of the Act (S. R. 25–26; R. 62). The Company on April 26 posted a bulletin throughout its operations in which lip-service was paid to the right of self-organization, with emphasis placed however on the negative aspects of the Act and the "strikes and unrest" which flowed from a union organization, and an appeal made to the employees "individually or as a group" "to deal directly with the Company" as "in the past" rather than through representatives, as contemplated by the Act (S. R. 24–25, 37; R. 34–35). During the days following the posting of the bulletin Superintendent Bishop called various employees to his office, told them the Company had "money put away for the purpose of fighting the unions" and urged formation of a company union (S. R. 25, 38, n. 26; R. 63–64, 83–84, 105, 162, 168, 403–404). In view of the Company's whole course of conduct the bulletin was clearly coercive (S. R. 42–43).[8]

President Holtzclaw immediately issued instructions that no organizing activities could be carried on on Company time and property (R. 350, 428–429). An A. F. of L. representative distributed leaflets among the Richmond employees about this same time (R. 793–794).

[8] See for example, the testimony of Smith that the impression the bulletin made on him was that "I didn't feel that the company wanted us to have an outside organization" (R. 168). Other employees expressed their fear of Company reprisal if they joined an outside union (R. 64, 82–83, 160, 172, 185–186, 492).

Superintendent Bishop during the first part of May 1937 undertook to set up a company union at Norfolk. He directed employee Reutt to arrange meetings of employees on company time and property to form an inside union (S. R. 25–26; R. 64–68, 84, 403),[10] argued the merits of such a proposal to employee Smith (R. 162, 168), made a speech at the first of the meetings arranged at his direction (S. R. 26; R. 475), provided Elliott, the chairman selected at the meetings, with a copy of the company union plan in effect at the Colorado Fuel and Iron Company for his guidance (S. R. 35; R. 105–106, cf. 80–81), promised Elliott a good job with the Company if he would "swing the men into the company union" (S. R. 35; R. 104, 78, 74–75) and repeatedly met with a committee elected at the meetings and directed their activities for furthering a company union (S. R. 34; R. 68–69, 71, 81, 97–98).

On May 24, 1937, pursuant to a scheme worked out in advance the Company gathered employee representatives from each of its departments in Richmond and Norfolk to hear a prepared speech

[10] Reutt, aware of the Company's hostility to collective activity, was at first afraid to acquiesce in Superintendent Bishop's suggestion for fear his union sympathies were being tested and he would be fired if he even agreed to start this sort of a union (R. 64). However, Superintendent Bishop persuaded Reutt the Company really wanted a company union and thereafter Reutt sought to achieve Company favor by working arduously at promoting the I. O. E. (R. 64–67, 76–78, 81).

delivered in the first city by President Holtzclaw and in the latter city by Vice-President Throckmorton (S. R. 26–27, 37–38; R. 37–40, 169, 252–253, 317–318, 376–377, 660, 790, 822–823, 914–915).[11] The speech, although couched in careful language, in effect urged employees to form a company-wide union unaffiliated with any national organization (S. R. 27–28, 38–39, 44–46; R. 822–823).[12] At Richmond President Holtzclaw added at the conclusion of his set speech that any wage increase granted by the Company would be retroactive to June 1, 1937, a suggestion nicely calculated to spur the employees to zealously carry out the Company's proposal (S. R. 28, 39; R. 53, 435,

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[11] Superintendent Bishop told Reutt, Elliott, and other members of the committee with which he had been working at Norfolk of the fact Holtzclaw would speak at Richmond and they attended (R. 69, 98). The other representatives attending the meetings were elected at meetings held on company time and property and convened for this purpose by the Company's supervisory force at President Holtzclaw's directions (S. R. 26–27; R. 781, 739–740, 553–555, 169). Thus, the line foremen at Norfolk were all instructed to have their men attend a meeting in the company building during working hours (R. 168–169). Superintendent Hollik addressed the meeting, stating that he could not see "why it would be necessary to join any outside organization," that the men "could accomplish just as much among themselves" (R. 184–185, 189). He then left the men to elect their representative to hear the president's speech (R. 185).

[12] President Holtzclaw himself testified at the hearing that the purpose of the speech was to induce employees to form an organization (R. 50–51). Various employees who attended the meetings at which the speech was delivered testified that the employees understood the speech to mean that

454–455).[13] As the Company officials left these meetings, in accordance with arrangements made beforehand, they announced that the representatives might remain for further discussion of the matters broached, thus providing an obvious invitation for immediate action along the lines laid down by the Company (S. R. 28, 39; R. 45, 385, 455, 586).[14] The Richmond representatives, after electing a temporary chairman to "push this thing into an organization," decided to inform their constituents as to what had occurred at the meeting and to report back their reactions at a meeting of the representatives to be held on June 1 (S. R. 29; R. 100, 740–741, 790–791, 928). The Norfolk representatives decided to ascertain the reaction of their

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they "had" to form a company union, as the Company was opposed to the C. I. O. and A. F. of L. (R. 70–71, 86, 89, 98–100, 138, 492).

[13] Employees who heard the speech understood the sense of Holtzclaw's reference to the wage increase to be that as soon as they got a company union going they would get the increase (R. 70, 71, 89, 100, 138–139).

[14] The effectiveness of this strategy is shown by the fact that the employees attending the May 24 meetings assumed a large part of the work of organizing the I. O. E., although prior to May 24 they had not, for the most part, even considered the necessity of forming a labor organization (S. R. 46, n. 40; R. 638, 727, 715, 736–737, 770). Not only did these employees constitute a large majority of the original steering committees (R. 758, 914–915, 98, 710–711, 928), but 8 of 10 members of the general committee, the governing body of the I. O. E. (R. 580), were employees who attended the May 24 meetings (R. 920, 923), as were 18 of the 27 representatives elected by the various voting sections of the I. O. E. (S. R. 46, n. 40; R. 920–921, 925).

constituents to the message and to bring written authorizations from them to a meeting on June 1 (S. R. 29; R. 667, 678).

During the week following May 24, meetings of employees were held in almost every department. These meetings took place on company property and, to a large extent, on company time (S. R. 29; R. 808, 587, 736, 742–743, 782, 795–798).[15] The Company's supervisors actively cooperated. Superintendent of Distribution Crafton arranged to have the Norfolk linemen brought in without working overtime so that they could hear the report from their representatives (S. R. 29; R. 676). Superintendent Davis, of the Reeves Avenue plant in Norfolk, gave permission for the use of the company auditorium on May 27 (S. R. 29; R. 727–728). Superintendent of Installation Walke in Richmond permitted the use of the Service Building for meetings of the line department and the engineering group during working hours, and held the linemen in the office so that they could attend (S. R. 29; R. 742–743, 791, 797–798). At each meeting, after the Company's message had been reported to the men,[16] they im-

[15] During this week Superintendent Bishop called the representatives of the Norfolk transportation group to his office and explained what advantages would accrue if each employee would contribute a small monthly amount so they could hire their own lawyer and have their own union (S. R. 34; R. 71, 101–106, 96–97, 162).

[16] At the meeting of Norfolk linemen, Brown, who had been elected as their representative to attend the May 24

mediately voted to form an unaffiliated union and elected as representatives to bring about its formation (S. R. 29; R. 308, 587–588, 665, 696, 727, 743–744, 754, 761–762, 782–783), the same representatives for the most part whom they had previously selected at the Company's request to hear the May 24 message (S. R. 53; R. 109–110).[17]

During the first half of June the representatives chosen to form the inside union held numerous meetings on company property (S. R. 29–30; R. 110–112, 679–680, 697–698, 718, 754–755, 839–842, 889–890, 927–934). They employed an attorney to draft a constitution and by-laws for a system-wide organization (S. R. 29–30; R. 839–841, 679–680, 697–698, 715).[18]

On June 15 the Richmond and Norfolk steering committees, as well as representatives from other

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meeting, reported back that they were to form an independent union, that "the Company don't want you to join any outside affiliation. If you do you are liable to make the Company mad" (R. 172, 185–186).

[17] Fourteen of the 17 representatives who took part in the June 1 meeting at Richmond and 8 of the 9 Norfolk representatives at the first joint meeting on June 3 at Petersburg had been previously designated as representatives to hear the May 24 message (R. 914–915, 98, 929, 839). Superintendent Bishop was kept informed of the attendance of the Norfolk representatives, for their absence from the meeting scheduled for June 2 caused him to assure their presence at the June 3 meeting (R. 110, 839).

[18] The minutes of this meeting show that the proposal of one of the committeemen that they "procure counsel that is definitely partial to the general interests of labor" was overruled with the proposal "that emphasis be laid upon the standing of their lawyers as corporation lawyers, because of the importance of their ability in this respect to the continuation of our purposes" (R. 839–840).

cities in which the Company operates, met together and adopted the constitution and by-laws of the I. O. E. (S. R. 30; R. 844–855, 915–920, 688–689, 746–747). The constitution and by-laws make no provision for holding of meetings of members of the various voting sections (S. R. 31; R. 873).[19] They do contain a provision requiring all members to authorize the Company to deduct dues in the organization from their pay checks (S. R. 32; R. 855).

The I. O. E.'s whirlwind membership campaign; the execution of the closed-shop and check-off contract.—On June 18 application cards for membership in the I. O. E. were distributed throughout the Company's entire system (S. R. 31; R. 600, 683, 748–749); a number of them were signed on the Company's premises during working hours (S. R. 31; R. 77, 155–156, 173–175, 184, 193).[20] Within

[19] Subsequently the by-laws were amended by the General Committee to provide for *annual* meetings of the various voting sections (S. R. 31, n. 16; R. 898). With the exception of the Norfolk Distribution and Construction voting section, it does not appear that the various voting sections held regular meetings (R. 903–912). Significantly, it was in the Norfolk Distribution and Construction voting section that A. F. of L. members were concentrated, and it was at their insistence that regular meetings were held (R. 659–660).

[20] In one instance both Superintendents Hollik and Crafton participated in securing the signature to an I. O. E. card of an employee who had theretofore turned down several requests made by mere employees (R. 205–206, 209, 218). Employee Reutt, who had been urged by Superintendent Bishop to put the I. O. E. membership drive across in Norfolk, found employees "antagonistic" to him, as they con-

less than 2 weeks a majority of the Company's more than 3,000 widely scattered employees applied for membership in the I. O. E. (S. R. 31; R. 758, 778–779, 710). The Board found that the success of the membership drive was in large part due to the Company's sponsorship and assistance to the I. O. E. and its persistent and well-known opposition to national unions (S. R. 40–41).

Thereafter, the I. O. E. completed its organization by electing representatives to its permanent committees (S. R. 31; R. 893–898, 651–652, 805, 948–952). On July 30 the Company met with I. O. E. representatives for the purpose of negotiating a contract (S. R. 32; R. 874). The Company readily

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sidered it a "company union" and "detrimental" to them, and accused him of being a "company man" (R. 76–78, 81). He, thereafter, tried to see less of Superintendent Bishop but continued to solicit signatures for about a month, telling employees that the Company was going to sign a closed shop with the I. O. E. and they would be out if they did not join (R. 76–78). He believed that the Company would really fire those who did not join "voluntarily and quick" because he knew the I. O. E. was company favored and because Superintendent Bishop's son, Warren, had stated that those who were not in the company union would be fired as soon as it got fully organized (R. 76, 78). Underwood, one of the most active organizers of the I. O. E. at Richmond, sought to induce the Norfolk transportation group to join the movement for a company-wide unaffiliated organization with the argument that the employees could accomplish more with the Company with such an organization, that the Company would "absolutely refuse to deal with the C. I. O. or the American Federation of Labor; that the Company had a lot of money to fight such organizations, and that * * * the Company was going to be very favorable to his organization" (R. 75, 113–114, 819).

agreed to recognize the I. O. E., and granted the I. O. E. in the recognition clause the right to erect bulletin boards on company property (S. R. 32; R. 826, 875). The Company offered no objection to a check-off provision, providing for the deduction of I. O. E. dues from members' wages upon written orders signed by the members (S. R. 32; R. 299–300, 823, 876).[21] A closed-shop provision was discussed for "a good part of two hours" at the opening session; further discussion was postponed while the representatives of various departments split up and discussed with departmental officials of the Company matters pertaining to their departments (S. R. 32; R. 260, 345, 875–877). Discussion of the closed-shop issue was not resumed until the final session of the conference held the next day when, after 2 hours' further discussion, the closed-shop provision was agreed upon[22] (S. R. 32; R. 297, 303–304, 265). The

[21] Prior to meeting with the I. O. E. committee the Company had decided to grant the check-off (R. 299–300). While a proviso was added that an employee might revoke his authorization at any time (S. R. 32; R. 876, 300), the proviso was admittedly meaningless (R. 300), since the I. O. E.'s constitution and by-laws required its members to authorize the deduction of dues (*supra*, p. 13), and since the Company promptly thereafter entered into a closed-shop contract, requiring all employees to become members of the I. O. E. (R. 827–828, 878).

[22] During the bargaining negotiations some of the members of the I. O. E. committee expressed themselves as opposed to the closed shop (R. 297–298, 299). The closed-shop provision, which was to be effective in 90 days, provided that it should not affect the right of employees to join or remain members of other labor organizations (S. R. 32, n. 19; R. 878).

contract also provided wage increases costing the Company $600,000 annually, which were made retroactive to June 1, 1937, as President Holtzclaw, on May 24, had promised (S. R. 32–33; R. 265, 838). After ratification by the interdepartmental committees, the contract was formally executed on August 5, 1937 (S. R. 33; R. 878, 826–839). Two weeks later the Company anticipated the collection of I. O. E. dues by paying to the I. O. E. $3,784.50, although it had not at that time checked-off any sums from the employees' wages (S. R. 33; R. 860). On November 4, when the closed-shop provision went into effect, the Company discharged two employees, Staunton and Elliott, because they refused to become members of the I. O. E. (S. R. 33; R. 172–173, 181, 267–268.) [23]

The Company's concurrent discrimination against all other organizations.—Throughout the period in which the I. O. E. was being established the Company not only affirmatively supported it by the acts of assistance above described but also gave it substantial support by failing to accord equal facilities to and suppressing all efforts for the establishment of an A. F. of L. or C. I. O. union (S. R. 33–35, 47).

Although many of the meetings to form the I. O. E. were held on company property and solicitation of memberships took place on company time and property, the A. F. of L. organizer

[23] The Board found that these discharges violated Section 8 (3) and (1) of the Act (S. R. 50–51).

was expressly barred from use of these facilities by specific instructions issued by President Holtzclaw, n. 8, p. 6, *supra*). In June 1937, C. I. O. meetings were held under surveillance by Edwards, a supervisor under Superintendent Bishop in the Norfolk transportation department (S. R. 33; R. 119–120, 233–234, 163–164). Edwards also warned employees that they would be discharged if they kept "messing with the C. I. O." (S. R. 33; R. 162, 89, 152) and otherwise harassed those suspected of union membership and activities (S. R. 33–34; R. 106, 148–149, 157–160).[24] Bishop himself, to pose an object lesson as to what would happen to employees who opposed the Company's plans, summarily discharged Mann, an employee who at the first of the meetings looking to the formation of an unaffiliated union had openly spoken against the Company's position, on the alleged ground that, in discussions with other employees, Mann had failed to refer to Bishop as "Mr." (S. R. 33, 40, 49–50; R. 140–141, 143–144, 154, 115, 128, 379). The discharge was timed for the eve of the crucial June 1 meetings at Norfolk and Richmond (S. R. 29; R. 928–931, 889) and was based on so patent a pretext that no employee could fail to understand the warning to all employees implicit therein (S. R. 33, 43, 49–50).[25]

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[24] General Foreman May expressed surprise to an employee that he had joined the A. F. of L., stating that he thought he needed his job (R. 204, 218).

[25] The Board found that the discharge of Mann violated Section 8 (3) of the Act (S. R. 49–50).

Upon the basis of these findings and the entire record in the proceeding the Board concluded that the Company had violated Section 8 (1), (2), and (3) of the Act (S. R. 35–36, 48). The Board's order required the Company to cease and desist from the unfair labor practices found and from giving effect to its contract with the I. O. E. (S. R. 59–60). In addition the Board's order affirmatively directed the Company to withdraw all recognition from and completely disestablish the I. O. E. as a representative of its employees, to reinstate, with back pay two[26] of the three employees found to have been discriminated against,[27] to reimburse its employees in the amount of dues checked off their wages on behalf of the I. O. E. and to post appropriate notices (S. R. 59–62).

The Company and the I. O. E. again petitioned the court below to review and set aside the Board's order (S. R. 62–63). The court on December 9, 1942, rendered an opinion and entered a decree enforcing the Board's order in full (S. R.

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[26] For reasons set forth in its decision (S. R. 57–58) the Board found that it would not effectuate the policies of the Act to order the reinstatement of or award of back pay to one of the employees found to have been illegally discriminated against.

[27] In this respect the Board's order differed from that originally entered. The Board's first order required the reinstatement with back pay of four employees, Mann, Elliott, Staunton, and Harrell (R. 979–980). The order entered after this Court's decision required reinstatement with back pay only of Mann and Staunton (S. R. 61).

62–79). Judge Soper dissented with respect to enforcement of that portion of the Board's order requiring the Company to reimburse its employees for dues checked off to the I. O. E. (S. R. 76–78).

After the decision below, the Board, on December 14, 1942, ordered elections to be held among the company's transportation employees. On December 18 the company withdrew its recognition of and thereby disestablished the I. O. E. as the representative of its employees generally (Pet. Br. p. 10). At a series of elections held subsequently among the transportation employees 1,112 votes were cast in favor of Amalgamated Association of Street, Electric Railway and Motor Coach Employees of America, American Federation of Labor, and 159 against (Case No. R–4571, certification issued January 13, 1943; Case Nos. V–R–1181 and V–R–1184, reports issued February 9, 1943).

SUMMARY OF ARGUMENT

The Board's findings that the check-off constituted an illegal deduction from the employees' wages to be used for an illegal purpose are fully supported by the evidence. The I. O. E. was a company-dominated union. The campaign for its membership was conducted under circumstances of Company hostility to affiliated unions and advocacy of the I. O. E. The employees knew that the Company was being kept informed of who signed the check-off. With the signing of

the closed shop, the employees could only avoid the deduction from their wages by giving up their jobs. The deduction was, therefore, a price coerced from the employees and used to spare the Company the cost of financing its illegally created labor organization.

In these circumstances an order requiring the Company to reimburse its employees for the amounts deducted effectuates the policy of the Act. Such an order serves to make the employees whole and to remove the consequences of the employer's law violation. The remedy is no different in purpose or effect from the award of back pay to wrongfully discharged or wrongfully demoted employees. The requirement that the employer pay employees the full wages earned without benefiting by deductions made for the purpose of supporting an organization which he has sponsored is necessary to assure employees' freedom for self-organization. If employees are assured that they will not be saddled with the cost of supporting the organization of the employer's selection, they will feel much more free to contribute to the support of a labor organization of their own choice.

ARGUMENT

THE BOARD LAWFULLY ORDERED THE COMPANY TO PAY TO THE EMPLOYEES THE WAGES WRONGFULLY DIVERTED TO THE I. O. E. AS DUES

The facts found by the Board and shown by the evidence, as set forth in the Statement (pp. 3–19,

supra), fully warrant its determination that the Company dominated and interfered with the formation and administration of the I. O. E. and contributed support to it in violation of Section 8 (2) of the Act (S. R. 35–36, 48). The second decision of the Board, following the directions of this Court, based its findings and conclusions respecting the I. O. E. upon an appraisal of all the facts disclosed by the record. The argument here made, that the second decision of the Board contains the same defects found by this Court in its first decision (Pet. Br. pp. 3–9, 36–37), was rejected by the court below (S. R. 67) and is clearly untenable, as the slightest comparison of the new decision (S. R. 14–62) with the old (R. 952–980) shows. Although contesting the legality of the findings respecting domination in so far as pertinent to the reimbursement of union dues, petitioner has failed to refer to any specific finding which it claims to be unsupported. We shall take it as established, therefore, that the Board properly held the I. O. E. to be an organization established and maintained in violation of Section 8 (2).[28]

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[28] *National Labor Relations Board* v. *Fansteel Metallurgical Corp.*, 306 U. S. 240, 262; *National Labor Relations Board* v. *Link-Belt Co.*, 311 U. S. 584, 599–600; *National Labor Relations Board* v. *Pacific Greyhound Lines, Inc.*, 303 U. S. 272, 275; *National Labor Relations Board* v. *Falk Corp.*, 308 U. S. 453, 460–461; *H. J. Heinz Co.* v. *National Labor Relations Board*, 311 U. S. 514, 521–523; *Westinghouse Electric & Mfg. Co.* v. *National Labor Relations Board*, 312 U. S. 660, affirming 112 F. (2d) 657, 659–660 (C. C. A. 2).

Nor is there basis for the Company's contention that the court below failed to pass on the substantiality of the evidence to support the Board's findings (Pet. Br. 4). While the court below was of the view that under the doctrine of the "law of the case" it was precluded by this Court's reversal of its earlier decision from holding the evidence insufficient, it did, nevertheless, pass an independent judgment thereon "as an additional ground of decision" and declared that in the light of the opinion of this Court, it would not be "justified in holding it [the evidence] insufficient" (R. 70–71).

The question in this case is whether the Board properly ordered the reimbursement of dues checked off by the union which was established at the instance of the company. This depends upon whether there is basis for the Board's finding (S. R. 55) that such an order is necessary to effectuate the policies and purposes of the Act and to fully remedy the effects of the unfair labor practice.

In evaluating the Board's judgment in this respect the significance of the check-off as a method of interference by the company with its employees' freedom of choice of representative must be understood. A provision that an employer deduct from the wages of his employees the dues of a company-dominated organization is not to be treated as a

minor matter ancillary to the employer's unfair labor practice. The check-off provides an employer who is seeking to force a particular representative upon his employees with a powerful weapon, one which, though innocuous on its face, is likely without more to maintain in existence an organization which has been unlawfully established.

This result does not follow merely from the fact that the check-off secures the financial stability of the organization without direct contributions by the employer. Even more important is the fact that the check-off cannot operate without giving the employer a means of ascertaining the identity of those employees who are, and who are not, members of the favored union. Even where the check-off is not compulsory (as it is here), an employee who knows that his employer favors a particular organization will be under pressure to see that his name is on the approved list.

The use of the check-off as a device for compelling employees to support and maintain company-controlled labor organizations became so widespread in the railroad industry before 1934 that the amendments to the Railway Labor Act adopted in that year expressly made it unlawful for a carrier "to deduct from the wages of employees any dues, fees, assessments, or other contributions payable to labor organizations" (Section 2, Fourth,

48 Stat. 1185, 45 U. S. C., Section 152, Fourth).[29] In sustaining the validity of this provision in *Brotherhood of Railroad Shop Crafts* v. *Lowden*, 86 F. (2d) 458 (C. C. A. 10), certiorari denied, 300 U. S. 659, the court described the coercive effect of the check-off as follows (p. 461):

> * * * The deduction of dues payable to an organization from the wages of employees discloses to the carrier the affiliation of employees with unions. It discloses which of them belong to a particular union. * * * Furthermore, it proffers an opportunity for the carrier to take into consideration the status of employees in respect to unions in connection with matters of promotion, discipline or dismissal. It is

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[29] The hearings and debates on both bills make it clear that the evil against which the prohibition was directed was the use of the check-off by the railroads as a means of coercing employees to support and to pay the cost of maintaining company unions instituted by the railroads to defeat genuine self-organization. See Senate Hearings on S. 3266 to amend the Railway Labor Act, Committee on Interstate Commerce, 73d Cong., 2d Sess., pp. 23, 165; 78 Cong. Rec. 11718, 12390, 12553. This provision was explained to the Senate Committee on Interstate Commerce (Hearings on S. 3266, 73d Cong., 2d sess.), by Federal Coordinator of Transportation Eastman. He said, p. 23:

"The reason is that a railroad is thus given information as to whether or not employees are paying dues in an association. It is very easy for the railroad to create the impression, or for the employees to get it in some other way, that the fact they do or do not pay dues will have some influence upon their record with the railroad company. * * *"

A somewhat fuller explanation of the effect of the check-

> readily conceivable that, moved by a desire to avoid the displeasure of the carrier with the possible loss of employment, employees may be influenced to join a particular union or dissuaded from withdrawing membership. * * *

In the same case the District Court had referred to the pay-roll deduction plan as "a subtle and insidious method of exercising influence over working men in order to insure their continued membership in company unions, even though they were not 'sold' with the virtues of such unions." *Association of Rock Island, etc. Employees* v. *Lowden*, 15 F. Supp. 176, 184 (D. Kans.).

Although the National Labor Relations Act does not go so far as to prohibit the check-off, it plainly

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off was made by George M. Harrison, on behalf of the Railway Labor Executives' Association. He stated (*id.* at p. 165):

"* * * The check-off system, instituted by many carriers, has only been an astute method of continuing company control of union finances while compelling the employees to pay the bill. The history of the 'voluntary' check-off system shows incontestably that the employees have been coerced into meeting the cost of company unions, controlled by the managements for the purpose of defeating the legitimate needs of railway workers. Union dues collecting by the railway managements not only surrenders union pursestrings into management hands, but it also gives to the management a list of employees who are supporting the personnel policy of the railroad. It would be a brave or foolhardy employee who refused to sign a check-off slip under such conditions, without protection by law or by a genuine labor organization."

empowers the Board to find that the deduction of dues by the employer on behalf of a company-dominated organization is unlawful. The circuit court of appeals held that in the circumstances of the present case, "the check-off was unquestionably an unfair labor practice" (S. R. 71).

The facts fully support this conclusion. From the outset of the campaign to enroll employees in the I. O. E., the membership blanks used contained a provision authorizing the check-off of dues and also a provision to be signed by the Company in acknowledging receipt of the notice of the check-off (R. 173, 843). Thus, the employees were informed the moment they were presented with a card for their signature that the Company would know whether they signed it or not. Furthermore, the attorney who drafted the membership blanks explained, when he proposed this form of membership card to the steering committee which was organizing the I. O. E., that the cards were to be executed in duplicate and one copy turned over to the Company (R. 919–920). So not only from the face of the card but also from the directions for its signature given by the solicitor would the employee be cautioned that the Company would know just where he stood. Nor would the Company be unaware of the significance of its failure to receive an authorization for the deduction of dues from any particular employee. The constitution and by-laws of the I. O. E. made authorization of the

check-off a requisite to membership in the organization (S. R. 55; R. 855). They expressly provided that each member "shall direct the proper disbursing officer of the Company to deduct the amount of such member's dues from his wages, and pay the same to the I. O. E." and that "any member failing to pay the dues as required" would forfeit his membership (*ibid.*). It would thus be apparent to the Company that any employee whose dues were not checked off was not a member of the I. O. E.

The Board found that the success of the membership campaign which resulted in securing the signature of a majority of the Company's more than 3,000 widely scattered employees within 2 weeks of the date the cards were distributed was largely the result of the Company's "sponsorship and assistance to the I. O. E. and its persistent and well-known opposition to national unions" (S. R. 40–41, 48). This finding is fully supported by the evidence. See pp. 4–14 *supra*. Even Company witness Davenport admitted at the hearing that he joined the I. O. E. because he knew the Company wanted it and he wanted to keep his job (R. 492). Employee Reutt, who was soliciting at the behest of Superintendent Bishop, testified he encountered "hostility" because the men accused him of being a "company man," the I. O. E. of being a "company union" and "detrimental" and in order to get signatures had to re-

mind the men of the Company's opposition to unions and the risk of losing their jobs if they did not join "voluntary and quick" (R. 76–78, 81). Rumors of an impending closed-shop with the I. O. E. were used to hasten the gathering of signatures (R. 78). The drive to get the cards signed took place extensively on Company property (S. R. 55; R. 205–206, 208–209), often on Company time (S. R. 55; R. 77, 155–156, 173–175, 184, 193).

After a majority of the employees had signed the combination membership and check-off card, the Company entered into the closed-shop contract theretofore predicted (R. 874–878).[20] The contract was executed on August 5, 1937 (R. 878) and on August 20, 1937, the Company paid the I. O. E. $3,784.50 as dues, pursuant to the check-off provisions of the contract, although it had not yet made the deduction from the wages of its employees (S. R. 33; R. 779–780, 860). On November 4, 1937, when the closed-shop provision went

[20] According to the National Industrial Conference Board, "There is no questioning the fact that an overwhelming majority of executives who determine the policies of their companies are strongly opposed to the closed-shop principle." National Industrial Conference Board, Studies in Personnel Policy, No. 12, *The Closed Shop* (March 1939), p. 11. "The average employer's opposition to the check-off is even more intense than to the closed shop." Robert R. R. Brooks, *When Labor Organizes* (1937), pp. 18–19. Nevertheless a closed shop is often the last step in the familiar company union pattern. Joseph Rosenfarb, *The National Labor Policy* (1940), pp. 256–257. "After the company union has been erected, the second problem is to keep it under control. * * * When

into effect, the Company discharged the only two employees who refused to join the I. O. E. and authorize the check-off (S. R. 33, 51; R. 172–173, 181, 267–268, 858–859). It is apparent from these facts that we do not have a system such as is discussed in petitioner's brief (pp. 25–27), whereby the employer merely deducts union dues from the wages of those employees who voluntarily authorize him to do so, although that in and of itself might affect the employees' freedom of choice, since it would enable the employer to know who belonged to the favored organization (see pp. 23–25, *supra*). Here we have the check-off combined with a closed shop,[31] and with a provision in the by-laws of the I. O. E., making the check-off compulsory upon all members. Under the closed shop, no man could work for the Company without

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membership dues are collected from the workers, control may be maintained by subtracting the dues from the pay envelopes." Robert R. R. Brooks, *op. cit.*, pp. 92–93. Cf. United States Department of Labor, Bureau of Labor Statistics Bull. No. 634, *Characteristics of Company Unions*, 1935 (U. S. Gov't Printing Off., 1938), p. 116. "In our survey of railroad company unions we have noted the frequent use of the check-off to collect company-union dues. While objecting to this method when it is used in a contract between a trade union and an employer, those open-shop corporations have nothing to say against it when it meets their own purposes. They quickly forget their open-shop principles." Dunn, Robert W., *Company Unions* (1927), p. 170.

[31] The Board held this contract invalid under Section 8 (3), which proscribes a closed-shop agreement with an organization established with the assistance of the employer (S. R. 48, 51, 54, 55).

belonging to the I. O. E. No person could belong to the I. O. E. without authorizing the Company to deduct his dues from his wages. Obviously, an employee's only alternative to accepting the check-off was to abandon his job.[32] The employer's use of any such device as a means of supporting a labor organization established at the instance of the employer is plainly a violation of the Act.

These provisions of the contract remained in full force and effect when the court below upheld the Board's finding that the contract was illegal and entered a decree enforcing the Board's order requiring the Company to cease giving effect to it (S. R. 54, 60, 76, 78–79; see Certified Supplemental Record, Vol. II, p. 13, at pp. 6 and 14). From November 4, 1937 until December 9, 1942, each employee who has worked for the Company[33] received from the Company less than the full amount of wages he earned.[34] The Board found

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[32] The Company's vice president admitted that the provision of the contract permitting employees to revoke the assignment of wages to the I. O. E. was meaningless: "If they had been revoked, of course, the employee has automatically ceased to be an employee" 90 days thereafter (R. 300).

[33] While the first deduction was made on August 20, 1937, it covered only the 2,523 employees who had by that date signed check-off authorizations (R. 860). By November 4, 1937, every employee had to sign such an authorization or leave the Company's employ (R. 172–173, 181, 267–268, 858–859).

[34] The dues were deducted semiannually in advance (R. 779–780, 860). Originally they were $3 a year, but in March 1938 they were increased to $6 a year (R. 576).

that the monies thus deducted from the wages of the employees constituted the price of retaining their jobs, a price coerced from them for [the Company's] purpose of supporting and maintaining the organization which [the Company] had dominated in order to thwart *bona fide* representation" and "that, as a result of the imposition of the illegal closed-shop and check-off requirements, the employees suffered a definite loss and deprivation of wages equal to the amounts deducted from their wages and paid over to the I. O. E." (S. R. 55). If any authorization by an employee to an employer to deduct sums from his wages and pay them over to a company-sponsored union could ever be voluntary, the authorizations in the instant case clearly were both involuntary in their inception and involuntary in their continuance without revocation. At no time were the employees free to refuse to enter into the authorization or to withdraw therefrom.

It is thus clear that the sums checked off the employees' wages, instead of being voluntary contributions, constituted forced tributes levied upon the employees for the maintenance and support of the very instrument by which the Company foreclosed any genuine exercise of the rights of self-organization and collective bargaining. Without the semblance of choice on their part, the employees were compelled to forego a portion of their earned wages and to allow the Company to withhold it and turn it over to the organization

which the Company itself had caused to be created to serve its own ends. As the Board found, it was an exaction enforced by illegal means and used for an illegal purpose (S. R. 55).[35]

In these circumstances it was appropriate for the Board affirmatively to order that amounts unlawfully deducted from the employees' wages be returned. This Court has held that (*Consolidated Edison Co.* v. *National Labor Relations Board*, 305 U. S. 197, 236):

> The power to command affirmative action is remedial, not punitive, and is to be exercised in aid of the Board's authority to restrain violations and as a means of removing or avoiding the consequences of violation where those consequences are of a kind to thwart the purposes of the Act. * * *

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[35] That "agreements" to permit employers to make deductions from wages for various purposes are often not truly voluntary on the part of employees is indicated by many state statutes which outlaw or regulate particular types of such deductions, or require wages to be paid in full in cash. United States Department of Labor, Bureau of Labor Statistics Bull. No. 229, *Wage-payment Legislation in the United States*, by Robert Gildersleeve Paterson, Govt. Print. Off., 1918, pp. 94–117, 128–131; Bureau of Labor Statistics Bull No. 408, *Laws Relating to Payment of Wages*, by Lindley D. Clark and Stanley J. Tracy, Govt. Print. Off., 1926, pp. 24–33; Carroll B. Daugherty; *Labor Problems in American Industry* (4th ed. 1938), p. 822; Don D. Lescohier and Elizabeth Brandeis, *History of Labor in the United States, 1896–1932*, pp. 673–675. These acts were held constitutional in *Knoxville Iron Co.* v. *Harbison*, 183 U. S. 13; *Baltimore, etc., R. Co.* v. *Hagan*, 183 Ind. 522, 109 N. E. 194.

And in *Republic Steel Corp.* v. *National Labor Relations Board,* 311 U. S. 5, 13, the Court held that, although the Board had no power generally to compensate third parties for losses sustained as a result of unfair labor practices, its functions were, *inter alia,* "to make good to the employees *what they had lost* through the discriminatory discharge." [Italics supplied.]

There can be no doubt that the order requiring the reimbursement of the dues illegally checked off is a remedial measure which serves to "make good to the employees what they had lost," or that it removes the "consequences of violation" of the Act. Petitioner's position seems to be, however, that the consequences are not of a kind which will thwart the purpose of the Act, and accordingly that the Board's order will not effectuate the Act's policies.

In this respect we think that an order requiring the payment of the amount checked off to a company-dominated organization as dues is indistinguishable from an order requiring the payment of other compensation which has been withheld as the result of an unfair labor practice.

It would seem to be axiomatic that the Board, upon finding that as part of an unfair labor practice an employer had wrongfully withheld portions of the wages earned by his employees, could properly require the employer to pay over to his

employees the wages earned but not paid.[36] The power of the Board to require an employer to pay wages to an employee who has never earned the wages where his inability to work resulted from the employer's unfair labor practice is established beyond question.[37] Similarly, the power of the Board to require an employer to pay wages to an employee at a higher rate than that which he has earned where the failure to accord a promotion to a better job or the demotion to a poorer job was caused by the employer's unfair labor practices has uniformly been upheld.[38] Where

[36] That the award to the employees of the sums deducted from their wages is to be treated as the payment of unpaid wages is indicated by the common law analysis of a similar situation. An Indiana statute made it unlawful for railroad companies to maintain relief associations to which employees were required to resort for benefits if they were injured. Suits for wages earned but not received were brought against railroads for the amounts which had been checked off as dues to such associations over a period of years. It was held that the written assignments authorizing the check-off were void and that the employees were entitled to recover the "balance of wages due." *Baltimore, etc., R. Co.* v. *Hagan*, 183 Ind. 522, 524, 109 N. E. 194; *Vandalia R. Co.* v. *Kelley*, 187 Ind. 323, 325, 119 N. E. 257; *Baltimore & O. S. W. R. Co.* v. *Poston*, 114 N. E. 981 (Ind. App.); *Acton* v. *Baltimore & O. S. W. R. Co.*, 59 Ind. App. 280, 108 N. E. 535; *Baltimore & O. S. W. R. Co.* v. *Miles*, 184 Ind. 719, 720, 112 N. E. 524.

[37] *National Labor Relations Board* v. *Jones & Laughlin Steel Corp.*, 301 U. S. 1, 48–49; *Phelps Dodge Corp.* v. *National Labor Relations Board*, 313 U. S. 177.

[38] *National Labor Relations Board* v. *New Era Die Co.*, 118 F. (2d) 500, 506 (C. C. A. 3); *National Labor Relations Board* v. *American Potash and Chemical Corp.*, 98 F. (2d) 488, 491, 493–494 (C. C. A. 9), certiorari denied, 306 U. S. 643, enforcing 3 N. L. R. B. 140, 167; *National Labor Rela-*

wages have been withheld and turned over to a company-dominated labor organization the employee suffers two injuries in addition to those suffered when he is discriminatorily discharged: he expends his energy doing work for which he receives no recompense; as a result of the use to which the money withheld is put he is saddled with an agency he did not choose and which bars his bargaining through an agency of his own selection.

Thus, the return to an employee of wages earned by him from the Company, but never paid to him because under threat of loss of his job he assigned them to a company-dominated union, is in every respect the same kind of remedy, and just as necessary to an effectuation of the Act's purposes, as making whole an employee by awarding him back pay for a period of discriminatory lay-off or demotion. The withholding of a part of an employee's wages under such potent compulsion is as direct an injury as a loss of pay caused by a discriminatory discharge and calls as forcibly for an appropriate restorative.

The court below adopted the above analysis, stating (S. R. 72–73):

> An order requiring reimbursement of the check-off under such circumstances as exist

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tions Board v. *Acme-Evans Co.*, 130 F. (2d) 477 (C. C. A. 7), certiorari denied March 8, 1943, No. 681, this term, enforcing 24 N. L. R. B. 71, 119–120, 123. See also *Matter of National Motor Rebuilding Corp.*, 19 N. L. R. B. 503, at 520–521, 526–527.

> here * * * is closely analogous to orders directing the payment of back wages in case of discriminatory discharge. In the case of discriminatory discharge, the employee has lost wages as the result of an unfair labor practice, and the payment of back wages is ordered to wipe out so far as possible the effect of the practice and effectuate the purposes of the Act. Here, the employees have just as certainly lost the wages deducted under the check-off agreement, which because of the payment to a company-dominated union is also an unfair labor practice.

The Board properly found that ordering the employer to reimburse the employees for the dues deducted would tend to effectuate the policies of the Act. If an employee is compelled to pay dues to one labor organization, he is deterred from joining another; employees generally will not feel able to pay dues to two unions at the same time. Illustrative is the testimony of Bolton who explained the defection of members from the C. I. O. after the Company's signing of the closed-shop and check-off with the I. O. E., by saying, "You would have to be a millionaire to keep in all of them" (Tr. 875). While the C. I. O. gained a substantial number of members before the I. O. E. was recognized, after the closed-shop and check-off went into effect, despite the fact that the contract expressly permitted employees to belong to outside unions (R. 828) so long as they also maintained their mem-

bership in the I. O. E., the C. I. O. became dormant (R. 135, 246). The record strongly suggests that employees anxious to build an outside union might have been more successful, even while the I. O. E. was imposed upon them, if they had been able to assure their fellow employees that the Company would be forced to return the dues paid to the I. O. E. This knowledge would have made it more difficult for the employer to impose its untrammelled will on its employees, just as knowledge by employees that if a discriminatory discharge should befall them they will in time get back pay makes them bolder to exercise their rights of self-organization. Hence a compulsory check-off to a dominated organization in itself detracts from the employees' freedom to choose another as his representative. If the employee can count on repayment of the dues checked off,[39] he will unquestionably feel more free to join, or to continue his membership in, lawful labor organizations. Thus to require the reimbursement of dues illegally deducted effectuates the policy of the Act by "pro-

[39] It is argued by petitioner (pp. 18–19) that the employees cannot be rendered secure in this respect since, unless they had legal omniscience, they would not have known how this case would ultimately be decided. It is, of course, true that until the Board and the courts have established a body of precedents to that effect employees cannot count on reimbursement or any other kind of relief. This was just as true of the back pay requirement for discharged employees when it first came before this Court (*Texas & New Orleans R. Co.* v. *Brotherhood of Railway Clerks*, 281 U. S. 548; *National Labor Relations Board* v. *Jones & Laughlin Steel Corp.*, 301

tecting the exercise by workers of the full freedom of association, self-organization, and designation of representatives of their own choosing." Section 1; see *National Licorice Co.* v. *National Labor Relations Board,* 309 U. S. 350, 362–363. Just as back pay to a wrongfully discharged or wrongfully demoted employee assures employees that they may assert their rights of self-organization without risking the loss of wages, so back pay to an employee who suffers a wrongful check-off assures employees that if they proceed to finance an organization of their own choice they will not be forced to bear the expense of supporting both their own organization and that forced upon them by the employer.

Furthermore, should it be held that the Board cannot order the repayment of funds unlawfully checked off, an employer could evade the prohibition against giving financial support to a union through employing the system of deducting dues from the employees' wages. Instead of paying the costs of a company union out of his own pocket, as em-

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U. S. 1) as it is today for the reimbursement of dues checked off. Since in those cases the employees had no assurance of getting back pay in advance of this Court's ruling, the possibility that they might receive it probably did not induce them to act more independently, and it could have been argued there, as it is here, that for this reason the primary effect of the order was to act as a deterrent for employers in other cases. But there must always be a first decision on a point, and the fact that this is the case which may establish the precedent on the present problem should not affect the outcome or prejudice the employees involved.

ployers formerly had done, he escapes this burden by foisting it on his employees through the check off.[40] If he had only a cease and desist order to fear, there would be nothing to discourage an employer from engaging in such tactics, and the employees would be worse off than they were before. Only if the employer can be forced to make the employees whole will the employees be safeguarded against the employer's use of such a plan. Certainly an order which deprives the employer of positive benefits which would otherwise accrue from a particular means of violating the Act must be regarded as a reasonable method of effectuating the statute's policy to assure the employees' freedom of self-organization. In this respect, as in the others referred to above, we think the parallelism between an order requiring a repayment of dues compulsorily checked off and a back pay order is very close.

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[40] Outside of the railroad industry, to which reference has heretofore been made (see pp. 23–25, *supra*), most company unions did not charge dues. Of the total of 592 company unions studied, 411, covering 411,053 workers, reported that they had no provision for dues or any other means of raising funds from the membership. United States Department of Labor, Bureau of Labor Statistics Bull. No. 634, *Characteristics of Company Unions* (1935), pp. 61–62, 116. "Among the company unions covered, the practice of charging dues was in the main a development of the N. R. A. period and was confined almost entirely to optional-membership company unions," *ibid.*, pp. 115–116. See also Carroll R. Daugherty, *Labor Problems in American Industry* (4th ed., 1938), p. 640. This fact doubtless explains why Congress in adopting the National Labor Relations Act was not con-

Petitioner attacks the Board's findings that the check-off resulted in a loss of wages to the employees. The claim is that the I. O. E. conferred benefits which more than offset the amount of the deductions. It does not follow, however, from the fact that wages were raised or working conditions improved after negotiations with a dominated organization that such benefits were attributable, even indirectly, to the expenditure of money which the employees were compelled to advance for the support of that organization. As the court below points out (S. R. 75)—

> the Act proceeds upon the theory that the maintenance of a company dominated union is not a benefit but a detriment to the employees who are members of it. And it is no answer to this to point to wage increases and other benefits secured as a result of contracts made by the company dominated union; for it is manifestly impossible to say that greater benefits might not have been secured if the freedom of choice of a bargaining agent had not been interfered with.

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fronted with the use of a check-off to maintain a company union, whereas just the year before this problem loomed so large in the adoption of the Railway Labor Act Amendments (see pp. 24–25, n. 29, *supra*). However, Board cases show that since 1937, employers have on a large scale resorted to the check-off to finance company-dominated unions. The cases which have come before the courts and which are collected in petitioner's brief, Appendix B, are but a small proportion of the cases in which the Board has encountered the use of a check-off for such purposes.

Indeed the establishment by employers of organizations of which they approve obviously stems from their belief that the employer will benefit if the employees have such representation. Thus in the famous *Texas & New Orleans R. Co.* case [1] the railroad company's efforts to substitute a dominated organization for the independent Brotherhood was motivated by the belief that a wage controversy with its employees could be settled at an increased cost of $75,000 per year instead of $340,000 (281 U. S., at 559). The circuit court of appeals in that case pointed out that "a probable consequence of employees being so represented would be their failure to fare as well financially as they would have fared if they had been represented by a loyal agency intent on promoting their interests" (33 F. (2d) 13, 17 (C. C. A. 5)).

It is, of course, unnecessary to prove in the particular case that the employees would have received greater benefits by bargaining through a representative entirely independent of the employer. The Committee Reports on the National Labor Relations Act find specifically that collective bargaining is "reduced to a mockery by the imposition of employer-controlled labor organizations" (H. Rep. No. 1147, 74th Cong., 1st sess., pp. 10–11; S. Rep. No. 573, 74th Cong., 1st sess., p.

[1] *Texas & New Orleans R. Co.* v. *Brotherhood of Railway Clerks*, 281 U. S. 548.

17) and the Act itself, which outlaws such organizations as a medium for collective bargaining, may be regarded as a legislative finding that they are detrimental to employees.[42]

Even if it be assumed that the employees received some benefits from the dues paid to the I. O. E., the mere fact that an employer is required to pay more than the precise amount of the loss he occasions does not mean that the award to the employees is penal. *Overnight Motor Co.* v. *Missel,* 316 U. S. 572, 583 (holding the double damage provision of the Fair Labor Standards Act to be remedial and not penal); *Robertson* v. *Argus Hosiery Mills, Inc.,* 121 F. (2d) 285, 286 (C. C. A. 6), certiorari denied, 314 U. S. 681; *Hargrave* v. *Mid-Continent Petroleum Corp.,* 36 F. Supp. 233, 235 (E. D. Okla.); *Lorenzetti* v. *American Trust Co.,* 45 F. Supp. 128, 139, 140 (N. D. Calif.); *Cox* v. *Lykes Brothers,* 237

[42] Authorities in the field of employer-employee relations have long agreed that a prerequisite of genuine collective bargaining is that the employees be represented by representatives who are truly independent of the employer and that company-supported unions are worthless to the employees insofar as *bona fide* collective bargaining is concerned. Carroll R. Daugherty, *Labor Problems in Modern Industry* (4th ed. 1938), p. 646; Gordon S. Watkins, *Labor Problems* (1935, Rev. ed.), pp. 639–640; Dale Yoder, *Labor Economics and Labor Problems* (2d ed., 1939), p. 607; Twentieth Century Fund, Inc., *Labor and Government* (1935), pp. 326, 327, 330; Robert R. R. Brooks, *When Labor Organizes* (1937), pp. 90–91; John R. Commons and John B. Andrews, *Principles of Labor Legislation* (1936, 4th rev. ed.), pp. 409–410; note, *Employer Interference with Lawful Union Activity,* 37 Col. Law Rev. 827–828.

N. Y. 376, 379, 143 N. E. 226; *Calvin* v. *Huntley*, 178 Mass. 29, 59 N. E. 435; cf. *Brady* v. *Daly*, 175 U. S. 148, 153–155; *Turner Lumber Co.* v. *C. M. & St. P. Ry.*, 271 U. S. 259, 262.[42]

After mature consideration of the problem the Board has concluded that, in appropriate circumstances, a dues reimbursement provision does effectuate the policies of the Act, and has directed such relief. Under the Act the particular means by which the effects of unfair labor practices are to be expunged is, as this Court has repeatedly recognized, a matter "for the Board, not the courts, to determine." *International Association of Machinists* v. *National Labor Relations Board*, 311 U. S. 72, 82; *National Labor Relations Board* v. *Link-Belt Co.*, 311 U. S. 584, 600; *National Labor Relations Board* v. *Pennsylvania Greyhound Lines, Inc.*, 303 U. S. 261, 271. The Board's determination is final unless arbitrary. It was not

[42] Cf. *Baltimore & O. S. W. R. Co.* v. Poston, 114 N. E. 981, Ind. App. [redacted], allowing recovery of the full amounts of wages checked off to an illegal relief association without any allowance of credit for the benefits actually paid by the relief association to the employee. Likewise, in *Kettering* v. *Imperial Coal Co.*, 32 Pitts. L. J. 359, an employee, who was paid in part in scrip issued in violation of a Pennsylvania statute requiring wages to be paid in money, was allowed recovery of the wages represented by the script without any set-off on account of the value of the goods he purchased at a company store with the scrip. Similarly, the statutes authorizing recovery by employees of amounts deducted by employers expressly provide that no set-offs or counterclaims are allowable. United States Department of Labor, Bureau of Labor Statistics Bull. No. 229, *Wage-payment Legislation in the United States*, Govt. Print. Off., 1918, pp. 129–131.

arbitrary here. In this case by the combination of the closed-shop and check-off arrangement, the employees were kept firmly bound to the dominated I. O. E. To say that the Board may not in these circumstances direct reimbursement of the employees for the dues which the company deducted from their wages and paid over to its nominee is to assert that an employer who chooses to establish and maintain an illegal labor organization as a means of forestalling genuine self-organization is free to foist the cost of maintenance upon the employees, without restoring to the victims the amounts used by the employer for this illegal purpose. The Act impels no such result.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the decision below should be affirmed.

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APRIL 1943.

APPENDIX

National Labor Relations Act. (Act of July 5, 1935, Stat. 449, 29 U. S. C., Sec. 151, *et seq.*):

SEC. 7. Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in concerted activities, for the purpose of collective bargaining or other mutual aid or protection.

SEC. 8. It shall be an unfair labor practice for an employer—

(1) To interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7.

(2) To dominate or interfere with the formation or administration of any labor organization or contribute financial or other support to it: *Provided,* That subject to rules and regulations made and published by the Board pursuant to section 6 (a), an employer shall not be prohibited from permitting employees to confer with him during working hours without loss of time or pay.

(3) By discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization: *Provided,* That nothing in this Act, or in the National Industrial Recovery Act (U. S. C., Supp. VII, title 15, secs. 701–712), as amended from time to time, or in any code or agreement approved or pre-

scribed thereunder, or in any other statute of the United States, shall preclude an employer from making an agreement with a labor organization (not established, maintained, or assisted by any action defined in this Act as an unfair labor practice) to require as a condition of employment membership therein, if such labor organization is the representative of the employees as provided in section 9 (a), in the appropriate collective bargaining unit covered by such agreement when made.

* * * * *

SEC. 10. (a) The Board is empowered, as hereinafter provided, to prevent any person from engaging in any unfair labor practice (listed in section 8) affecting commerce. * * *

* * * * *

(c) * * * If upon all the testimony taken the Board shall be of the opinion that any person named in the complaint has engaged in or is engaging in any such unfair labor practice, then the Board shall state its findings of fact and shall issue and cause to be served on such person an order requiring such person to cease and desist from such unfair labor practice, and to take such affirmative action, including reinstatement of employees with or without back pay, as will effectuate the policies of this Act. * * *

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(e) * * * The findings of the Board as to the facts, if supported by evidence, shall be conclusive. * * *

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U. S. GOVERNMENT PRINTING OFFICE: 1943

SUPREME COURT OF THE UNITED STATES.

No. 709.—October Term, 1942.

Virginia Electric and Power Company, Petitioner, *vs.* National Labor Relations Board.	On Writ of Certiorari to the United States Circuit Court of Appeals for the Fourth Circuit.

[June 7, 1943.]

Mr. Justice Murphy delivered the opinion of the Court.

After the remand of this case in 314 U. S. 469, the Board reconsidered it upon the original record, made new findings of fact, and concluded that the Company had violated § 8(1), (2) and (3) of the Act. 29 U. S. C. § 158. A new order was entered requiring the Company to cease and desist from the unfair labor practices found and from giving effect to its contract with the Independent Organization of Employees. The order also directed the Company to withdraw recognition from and disestablish the I. O. E. as a representative of its employees, to reinstate with back pay two of three employees found to have been discriminatorily discharged, to reimburse its employees in the amount of dues and assessments deducted from their wages by the Company and paid to the I. O. E., and to post appropriate notices. 44 N. L. R. B. 404. The court below, one judge dissenting in part, upheld the order in full. 132 F. 2d 390. The I. O. E. then apparently decided to dissolve, and the Company withdrew recognition from and disestablished it. Because of an apparent conflict of decisions, we granted the Company's petition for certiorari which challenged only the authority of the Board to require reimbursement of the checked-off dues, a point not reached when the case was here before.[1]

[1] In eleven cases five circuits, under varying circumstances and on diverse reasoning, have refused to enforce Board orders requiring reimbursement of checked-off dues. See Western Union Telegraph Co. *v.* National Labor Relations Board, 113 F. 2d 992 (C. C. A. 2); Corning Glass Works *v.* National Labor Relations Board, 118 F. 2d 625 (C. C. A. 2); National Labor Relations Board *v.* West Kentucky Coal Co., 116 F. 2d 816 (C. C. A. 6); National Labor Relations Board *v.* U. S. Truck Co., 124 F. 2d 887 (C. C. A. 6); National Labor Relations Board *v.* Gerity Whitaker Co., 10 L. R. R. 494 (C. C. A. 6); National Labor Relations Board *v.* J. Greenebaum Tanning Co., 110 F. 2d

The new findings are much more elaborate than those originally before us in 314 U. S. 469, and it would serve no useful purpose to discuss them minutely. The following outline is sufficient for an understanding of the issues raised: The findings sketch in considerable detail the anti-union background of the Company and the activities of Bishop, the superintendent of the Company's Norfolk transportation department, including his suggestions to employees Ruett and Elliott that they form unaffiliated organizations. The growth of the I. O. E. is traced from the speeches and meetings of May 24, 1937, which were held after requests for collective bargaining were received by the Company from several small groups of employees as a result of the bulletin of April 26, and which were attended by representatives selected by the employees at the suggestion of the Company. The tracing continues with a discussion of the reactions of those representatives after the Company officials left the meetings and their subsequent reports delivered to the employees on Company property and in some instances on Company time with the help of supervisory employees. Emphasis is placed upon the frequent meetings on Company property held by the resultant Norfolk and Richmond steering committees during the first part of June. The Constitution and by-laws of the I. O. E. were adopted on June 15. The membership campaign began June 17, and within two weeks the I. O. E. had a majority of the Company's 3000 widely scattered employees. The Board contrasted this with its findings that during the critical formative period of the I. O. E. the Company discharged one Mann, an outspoken foe of an "inside" union, that Edwards, a supervisor, kept C. I. O. meetings under surveillance and warned some employees against "messing with the C. I. O.", and that the Company denied the use of its premises to representatives of national labor organizations, and then drew the conclusion that the quick success of the I. O. E. membership campaign "must be attributed in large part to the respondent's [Company's] sponsorship of and assistance to the I. O. E. and its persistent and well-known opposition to national unions."

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984 (C. C. A. 7); A. E. Staley Mfg. Co. *v.* National Labor Relations Board, 117 F. 2d 868 (C. C. A. 7); Reliance Mfg. Co. *v.* National Labor Relations Board, 125 F. 2d 311 (C. C. A. 7); Kansas City Power & Light Co. *v.* National Labor Relations Board, 111 F. 2d 340 (C. C. A. 8); National Labor Relations Board *v.* Southwestern Greyhound Lines, Inc., 126 F. 2d 883 (C. C. A. 8); National Labor Relations Board *v.* Continental Oil Co., 121 F. 2d 120 (C. C. A. 10).

Continuing, the findings relate that the representatives of the I. O. E. in convention on July 17 and 18, drew up a proposed contract, embodying demands for a closed-shop, check-off of I. O.E. dues and substantial wage increases, which was sent to the Company with a request for a bargaining conference. The conference began on July 30, and the Company quickly gave recognition and offered no objection to the check-off provision, with the addition of a proviso that the employees might revoke their authorizations at any time. The by-laws of the I. O. E., however, required all members to authorize the deduction of dues, and the membership applications contained such authorizations. The closed-shop provision was discussed for two hours and then postponed for other matters until the following day, when it was again taken up for two hours and then agreed to with the addition, at the instance of the Company, of a provision that nothing in the contract should prevent employees from joining or remaining members of any other labor organization. Wage increases, costing the Company $600,000 annually, were granted, and, as President Holtzclaw had promised at the May 24 meeting in Richmond, they were made retroactive to June 1. The contract was formally executed August 5, and on August 20 the Company paid $3,784.50 to the I. O. E. as dues under the check-off provision, although it had not yet deducted that entire amount from the wages of its employees. The Board considered "the promptness with which the respondent [Company] agreed to grant the I. O. E. a check-off of dues and a closed shop . . . after a comparatively few hours discussion", and then found that the Company "agreed to the closed shop and the check-off of I. O. E. dues in order to entrench the I. O. E. among the employees and to insure its financial stability."

On the basis of these findings the Board concluded that:

"the respondent has engaged in a course of conduct calculated to restrain and discourage it's employees from self organization in nationally affiliated unions and to divert and canalize their organizational efforts to the establishment of a company-wide unaffiliated labor organization; that in its totality, the respondent's conduct has been coercive of its employees in the exercise of their right to self-organization, with the result that when they formed the I. O. E. they were not as free as the statute requires; that the I.O. E. is the fruit of the respondent's illegal interference with, and restraint and coercion of its employees; and that the respondent has dominated the formation and administration of the I. O. E., and has contributed financial and other support to it."

and again that:

"the I. O. E. was not the result of the employees' free choice; that it was initiated in response to the urgings of the respondent at the May 24 meetings to set up their 'own' organization; that the respondent's support of the organization during the critical formative period and its consistent opposition to nationally affiliated organizations are largely responsible for the adherence of the employees to the organization; and that the contract with the I. O. E. granting a closed shop and the check-off of the I. O. E. dues marked the climax of the respondent's efforts to erect an unaffiliated organization as a bulwark against nationally affiliated organizations. We find that the respondent has dominated and interfered with the formation and administration of the I. O. E. and has contributed support to it, . . ."

In discussing the appropriate remedy for the unfair labor practices found, the Board stated that the Company's domination and interference in the formation and administration of the I. O. E. constituted "a continuing obstacle to the exercise by the employees of the rights guaranteed them by the Act" and therefore the disestablishment of the I. O. E. was necessary. In addition the Board was of opinion that "under the circumstances of this case" the Company should be ordered to reimburse its employees for the amounts checked-off their wages and paid to the I. O. E.[2]

The company no longer attacks the conclusion that the I. O. E. was dominated by it, but it does contest the validity of the findings

[2] The Board's full statement on this point follows:

"The respondent concluded a closed-shop contract with the I. O. E., a company-dominated organization, thus compelling its employees to become and remain members of the illegal organization. Employees were in fact discharged because they refused to join the I. O. E. The check-off provision, a device by which the respondent assured the financial stability of the company-dominated organization, could no more be avoided by the employees than could the compulsory membership requirement. The bylaws of the I. O. E. required its members to execute check-off authorizations under penalty of being dropped from membership in the I. O. E., and thereby, under the closed-shop provision, from their jobs. We find that the monies thus deducted from the wages of the employees constituted the price of retaining their jobs, a price coerced from them for respondent's purpose of supporting and maintaining the organization which respondent had dominated in order to thwart bona fide representation. We further find that, as a result of the imposition of the illegal closed-shop and check-off requirements, the employees suffered a definite loss and deprivation of wages equal to the amounts deducted from their wages and paid over to the I. O. E. It is appropriate that the employees be made whole by reimbursement of amounts exacted from them for illegal purposes. We find that in these circumstances, the effects of the unfair labor practices may be fully remedied and the purposes and policies of the Act may be completely effectuated only by restoring the *status quo*. Hence, we shall order the respondent to reimburse its employees for the amounts deducted from their wages for dues and assessments in the I. O. E."

relating to domination in so far as may be pertinent to the reimbursement order, and it challenges the power of the Board to make that order under the circumstances of the case.

Under the applicable principles governing the scope of our review of Board orders, we think the Board's findings and conclusions regarding the Company's domination of and interference with the I. O. E. are supported by substantial evidence, and therefore conclusive. See *Labor Board* v. *Link-Belt Co.*, 311 U. S. 584; *I. A. of M.* v. *Labor Board*, 311 U. S. 72; *Labor Board* v. *Automotive Maintenance Machinery Co.*, 315 U. S. 282; *Labor Board* v. *Nevada Copper Co.*, 316 U. S. 105; *Labor Board* v. *Southern Bell Telephone and Telegraph Co.*, — U. S. —, Nos. 460-461 this Term. These findings and conclusions are not subject to the infirmities of the original ones which prompted our decision in 314 U. S. 469. While the bulletin of April 26 and the speeches of May 24 are still stressed, they are considered not in isolation but as part of a pattern of events adding up to the conclusion of domination and interference. We are also of opinion that the Board had power to enter the check-off reimbursement order in the circumstances of this case.

Section 10(c) of the Act[3] authorizes the Board to require persons found engaged or engaging in unfair labor practices "to take such affirmative action, including reinstatement of employees with or without back pay, as will effectuate the policies of this Act." The declared policy of the Act in § 1 is to prevent, by encouraging and protecting collective bargaining and full freedom of association for workers, the costly dislocation and interruption of the flow of commerce caused by unnecessary industrial strife and unrest. See *Labor Board* v. *Jones & Laughlin*, 301 U. S. 1. Within this limit the Board has wide discretion in ordering affirmative action; its power is not limited to the illustrative exemple of one type of permissible affirmative order, namely, reinstatement with or without back pay. *Phelps Dodge Corp.* v. *Labor Board*, 313 U. S. 177, 187-89. The particular means by which the effects of unfair labor practices are to be expunged are matters "for the Board not the courts to determine." *I. A. of M.* v. *Labor Board*, *supra*, at p. 82; *Labor Board* v. *Link-Belt Co.*, *supra*, at p. 600. Here the Board, in the exercise of its informed discretion, has expressly determined that reimbursement in full of the checked-off dues is necessary to effectuate

[3] 49 Stat. 449; 29 U. S. C. § 151 *et seq.*

the policies of the Act. We give considerable weight to that administrative determination. It should stand unless it can be shown that the order is a patent attempt to achieve ends other than those which can fairly be said to effectuate the policies of the Act. There is no such showing here.

The Board found that the Company was responsible for the creation of the I. O. E. by providing its initial impetus and direction and by contributing support during its critical formative period. It further found that the Company quickly agreed to give its creature closed-shop and check-off privileges "in order to entrench the I. O. E. among the employees and to insure its financial stability". The result was that the employees, under the I. O. E. by-laws, had to authorize wage deductions for dues to remain members of the I. O. E., and they had to remain members to retain their jobs.[4] Thus, as a price of employment they were required by the Company to support an illegal organization which foreclosed their rights to freedom of organization and collective bargaining. To hold that the Board is without power here to order reimbursement of the amounts so exacted is to hold that an employer is free to fasten firmly upon his employees the cost of maintaining an organization by which he effectively defeats the free exercise of their rights to self-organization and collective bargaining. That this may pervert the purpose of the Act is clear. It is equally clear that the undoing of the effects of such a practice may, in the judgment of the Board, remove a very real barrier to the effectuation of the policies of the Act, the protection of commerce through the elimination of industrial conflict by guaranteeing full freedom of association and genuine collective bargaining to employees. An order such as this, which deprives an employer of advantages accruing from a particular method of subverting the Act, is a permissible method of effectuating the statutory policy.

It is argued that disestablishment of the I. O. E. sufficiently effectuates the policies of the Act by restoring to the employees of the Company their freedom of association. But the Board need not be satisfied with the remedy alone. It has here determined that, to effectuate fully the policies of the Act, it is necessary to expunge the effects of the unfair labor practices by

[4] The proviso in the check-off agreement that employees might revoke their individual authorizations at any time was admittedly meaningless in view of the closed shop agreement and the requirement in the I. O. E. by-laws that its members authorize the check-off.

ordering the reimbursement of checked-off dues. Such a determination seems manifestly reasonable. It returns to the employees what has been taken from them to support an organization not of their free choice and places the burden upon the Company whose unfair labor practices brought about the situation. The deduction of dues from wages under the circumstances of this case is not unlike a loss occasioned by a discriminatory discharge, and an order for the return of those checked-off dues promotes the policies of the Act in substantially the same manner as would a back pay award. By returning their money to the employees, the order severs possible economic ties which they may have with the employer dominated I. O. E. and to this extent aids in completely disestablishing that organization and restoring to the employees that truly unfettered freedom of choice which the Act demands. If employees have some assurance that an employer may not with impunity impose upon them the cost of maintaining an organization which he has dominated, any more than he can make them bear the burden of a discriminatory discharge, they may be more confident in the exercise of their statutory rights.

The Company contends that the Board did not find that it continued to interfere with the I. O. E. after its organization, except with regard to the closed-shop and check-off clauses of the contract, and this finding is attacked as without foundation in evidence. It is said that the demand for a closed-shop and check-off originated with the employees who were free to abandon those provisions at any time by changing their by-laws or the contract, and that therefore the continuation of those requirements was the voluntary action of the employees for which the Company is not responsible. Finally it is urged that the Company should not be compelled to reimburse these voluntary payments because the employees received benefits, including substantial wage increases, from the I. O. E.

The short answer is that the Board has resolved all these contentions against the Company, and we cannot say it exceeded its competence in so doing. It made no finding of specific management interference in the I. O. E. after the execution of the contract, but it did conclude that the I. O. E.'s existence was a "continuing obstacle" to the employees' exercise of their statutory rights. This conclusion of continuation of the effects of an employer dominated beginning is a permissible one for the Board to draw. Cf. *Labor Board* v. *Southern Bell Telephone*

and Telegraph Co., — U. S. —, Nos. 460-461 this Term. It disposes of the argument that the men were free at any time to eliminate the check-off; because of the I. O. E.'s origin the Board could conclude, as it did, that they were not as free as the statute requires. Also, in view of the Company's interference in and support given to the I. O. E. and the celerity of agreement in the bargaining conference, the Board could infer, despite the fact that demands for the closed-shop and the check-off originated with the I. O. E., that the Company seized upon those provisions to establish the I. O. E. firmly. The fact that a contrary inference is possible from the evidence does not allow us to set aside the one drawn by the Board. *Labor Board* v. *Nevada Copper Co.*, 316 U. S. 105. This dissipates the force of the argument that the closed-shop and check-off provisions were forced upon the Company against its will.

The instant reimbursement order is not a redress for a private wrong. Like a back pay order it does restore to the employees in some measure what was taken from them because of the Company's unfair labor practices. In this both these types of monetary awards somewhat resemble compensation for private injury, but it must be constantly remembered that both are remedies created by statute—the one explicitly and the other implicitly in the concept of effectuation of the policies of the Act—which are designed to aid in achieving the elimination of industrial conflict. They vindicate public, not private rights. Cf. *Agwilines, Inc.* v. *National Labor Relations Board*, 87 F. 2d 146, 150-51; *Phelps Dodge Corp* v. *Labor Board*, 313 U. S. 177. For this reason it is erroneous to characterize this reimbursement order as penal or as the adjudication of a mass tort. It is equally wrong to fetter the Board's discretion by compelling it to observe conventional common law or chancery principles in fashioning such an order, or to force it to inquire into the amount of damages actually sustained. Whether and to what extent such matters should be considered is a complex problem for the Board to decide in the light of its administrative experience and knowledge. The Board has here determined that the employees suffered a definite loss in the amount of the dues deducted from their wages and that the effectuation of the policies of the Act requires reimbursement of those dues in full. We cannot say this considered judgment does not effectuate the statutory purpose.

The argument that the employees received some value from

their contributions via the check-off to the Company dominated I. O. E., is based upon the assumption that such an organization necessarily gives some *quid pro quo*. But in view of the purposes of the Act, a contrary assumption, that employees receive no benefit from a type of organization which Congress has characterized as detrimental to the interests of employees and provocative of industrial unrest, is possible. These are considerations for the Board to decide according to its reasoned judgment. We hold that the Board here made an allowable judgment. That judgment cannot be upset by pointing to substantial wage increases which the I. O. E. was granted. As the court below said, "it is manifestly impossible to say that greater benefits might not have been secured if the freedom of choice of a bargaining agent had not been interfered with." 132 F. 2d at 398. Cf. *Texas & N. O. R. Co.* v. *Ry. Clerks*, 281 U. S. 548, 559.

This reimbursement order cannot be labelled "penal". The purpose of the order is not to penalize the Company by requiring repayment of sums it did not retain in its treasury. Those sums did go into the treasury of the Company's creature to accomplish purposes the Company evidently believed to be to its advantage, and the order of reimbursement is intended to remove the effects of this unfair labor practice by restoring to the employees what would not have been taken from them if the Company had not contravened the Act. This is not a case in which the Board has ordered the payment of sums to third parties, or has made employees more than whole. Cf. *Republic Steel Corp.* v. *Labor Board*, 311 U. S. 7. The fact that the Board may only have approximated its efforts to make the employees whole, because of asserted benefits of dubious and unascertainable nature flowing from the I. O. E., does not convert this reimbursement order into the imposition of a penalty. Cf. *Overnight Motor Co.* v. *Missel*, 316 U. S. 572, 583-84.

We need not now examine the various situations that were before the Circuit Courts of Appeals in the case collected in Note 1, *ante*, or consider hypothetical possibilities. We decide only the case before us and sustain the power of the Board to order reimbursement in full under the circumstances here disclosed.

Affirmed.

Mr. Justice FRANKFURTER, concurring.

If the controlling facts in this case were like those in *Western Union Tel. Co.* v. *Labor Board*, 113 F. 2d 992, I too would accept

We start with the Board's finding - a finding not here for review -

the reasoning of Judge Learned Hand's opinion in that case and join my brother ROBERTS. But the vital difference between the *Western Union* and this case is that in the former "there was no evidence that all those [employees] who asked to have their wages stopped, did so in any part because they were coerced." *Id.*, at 997. Here the employees had no such choice; they could avoid the check-off of union dues only by giving up their jobs.

~~It is not denied~~ that through its domination of the I. O. E. the Company indulged in an unfair labor practice. But not only did it foster that company union, it foisted membership in the union upon all its employees. The Board had a right to find that membership in the union, which the employees had no power to reject, equally denied the employees the power to reject the costs of that membership. It was therefore justified in concluding that the employees should be made whole for that which was the consequence of the Company's compulsion upon them. Therein this case differs not only from the *Western Union* case but also from the decisions in four other circuits upon which my brother ROBERTS relies: *Labor Board* v. *West Kentucky C. Co.*, 116 F. 2d 816, 823 (C. C. A. 6); *Reliance Mfg. Co.* v. *Labor Board*, 125 F. 2d 311 (C. C. A. 7); *Labor Board* v. *Southwestern Greyhound Lines*, 126 F. 2d 883, 887 (C. C. A. 8); *Labor Board* v. *Continental Oil Co.*, 121 F. 2d 120, 125 (C. C. A. 10).

Needless to say, we have nothing to do with the wisdom of the Board's requirement that the coerced dues be restored to the employees. Our decision can go no further than that, within the framework of the general authority given to it by Congress, the Board is empowered to find that when men pay dues to a company-dominated union, upon pain of forfeiting their jobs, it is the company which has in fact commanded the payment of the dues and it is the company which must make restoration.

Mr. Justice ROBERTS.

The single question presented is whether the National Labor Relations Board, in ordering disestablishment of an unaffiliated union, may, in the circumstances disclosed, order reimbursement of dues paid by the employes to the union pursuant to individual assignments by employes and a union agreement for a closed shop and a check off of dues.

The court below (one judge dissenting) has sustained this feature of the order. I am of opinion that its judgment should be reversed.

The only provision of the Act on which the Board relies is that found in § 10(c)[1] which is that the Board may require the employer "to cease and desist from such unfair labor practice, and to take such affirmative action, including reinstatement of employees with or without back pay, as will effectuate the policies of this Act." The critical phrase is "to take such affirmative action . . . as will effectuate the policies of this Act." The policies of the Act are stated in § 1[2] as the encouragement of the practice and procedure of collective bargaining and the protection of the exercise by workers of full freedom of association, self-organization, and designation of representatives of their own choosing, for the purpose of negotiating the terms and conditions of their employment or other mutual aid or protection.[3] It is plain that a reimbursement order may be made by the Board only if it will effectuate these policies.

The court below has interpreted this grant of power to the Board as permitting what the court characterizes as a restoration of the *status quo*. The Act, however, contains no such expression and if it is given, as I think it has been in the present instance, the meaning of redress of private wrongs, it misrepresents the clear intent of the statute.[4]

The Act gives the Board no power to impose liability for any supposed injury arising out of the compulsion of employes to contribute dues to the union. Nor can the order of restitution be grounded upon any theory that although the unfair labor practice constitutes a public rather than a private wrong the power granted to effectuate the policies of the Act envisages imposition of a penalty for wrongful conduct on the part of the employer.[5]

There remains the question whether the order under review can be justified as appropriate to effectuate the policies of the Act. This question should be answered in the light of the facts

[1] 29 U. S. C. § 160(c).

[2] 29 U. S. C. § 151.

[3] See Republic Steel Corp. v. N. L. R. B., 311 U. S. 7, 10; N. L. R. B. v. Fansteel Corp., 306 U. S. 240, 257.

[4] H. R. 972, 74th Cong., 1st Sess., p. 21; H. R. 1147, 74th Cong., 1st Sess., p. 24. National Licorice Co. v. N. L. R. B., 309 U. S. 362, 363.

[5] Consolidated Edison Co. v. N. L. R. B., 305 U. S. 197, 236; Republic Steel Corp. v. N. L. R. B., 311 U. S. 7, 11, 12.

disclosed by the record. The Board has found that the employer was guilty of unfair labor practices in influencing employes in favor of a company union. The order requires the company to cease and desist from the practices, to cease giving effect to the existing agreement with the union, and to withdraw recognition from and disestablish that organization as a bargaining unit. This order is supported by findings that, at a time when no union existed, the company threw its influence in favor of an unaffiliated or company union. All the facts found in this connection relate to a time anterior to the organization of the union. There is no finding, and no facts which would justify a finding, that subsequent to the organization of the union the employer interfered with it, dominated it, or supported it in any manner. The union then organized made demands upon the company which were the subject of negotiations and out of those negotiations grew an increase of wages totaling about $600,000 per annum and a collective bargaining agreement which contained provisions for a closed shop and for the check off of union dues, both of which features were demanded and insisted upon by the union. There is no finding and no evidence that the employer in fact inspired, instigated, or coerced the employes to make these demands or had, even remotely, anything to do with them other than they followed its earlier encouragement of the organization of the union. From the day that contract was signed, no act of interference or domination, and no word even of suggestion from the company as to the union policy or practices is shown. The record demonstrates that the employer insisted that the check off of union dues should be authorized by each employe individually, subject to his untrammeled right of revocation, and that the closed shop provision should not prevent any member of the company union from also joining any other union of his choice. The fixation of the union dues was a matter within the control of the union members and continuance of check off as respects any employe was a matter for his voluntary determination so far as the employer was concerned. While it is not denied that the union procured substantial benefits for its members or that it represented them faithfully and fairly, nevertheless, because of the company's interference at the time of the organization of the union, that organization has been disestablished and indeed has now been dissolved.

It is to be noted that had it not been for the defect which tainted its capacity to represent the employes, its other activities

would have been wholly in accordance with the objects and purposes of the National Labor Relations Act. Nothing in that Act invalidates a collective bargaining agreement providing for a closed shop or for a check off of dues. If in fact those features of the agreement were the voluntary act of the employes, as on this record they must be found to have been, it is difficult to see how the policies of the Act are to be effectuated by repayment to the employes of the dues heretofore paid when such repayment can in no wise benefit the association which has been disestablished.

The company union having been disestablished, the employes are free to form or join any union and make it their bargaining agent. Any possible effect of company influence has been dissipated. The only possible effect of restitution of dues to employes who have not asked for repayment, who have received substantial benefits, from their contribution of dues, is to punish the employer and perchance operate as a warning to other employers that they will similarly be punished for unfair labor practices.

The Board seeks to sustain the order on the ground that the Act authorizes, as one form of affirmative action to effectuate the policies of the Act, the reinstatement of employes with or without back pay. The award of back pay, however, stands on a different basis. If employes are to be faced with discriminatory discharge for advocating union representation by an organization of their choice the threat will render doubtful, if not impossible, free and uncontrolled action on the part of the employes. The Act, therefore, is an announcement to employes that if they are discharged for such activity they may have reinstatement and, in proper cases, back pay. Such a promise to employes was essential to assure them immunity for conduct made lawful by the Act. But the payment of union dues is quite another matter, particularly where, as here, no employe was obliged to join the union, and no discrimination between employes resulted from joining or paying dues to the recognized union. It is inconceivable that the hope of reimbursement of dues paid to the union in question would have any effect on the conduct of the members to join or refrain from joining this union or joining another as they were free to do. Moreover, the employes were free under the Act to adhere to another organization and to bring about an election for the choice

of another bargaining representative. The Board made no inquiry and no finding respecting coercion of individual employes.

As I have already indicated, the only effect of the order is to redress a supposed private wrong to employes which the evidence and findings indicate never was inflicted, and to inflict drastic punishment of the employer for its earlier violation of the statute by encouraging its employes to organize. Neither is within the competence of the Board, as this court has repeatedly held.[6]

Like orders have been before the courts in eleven other cases as shown by the opinion of the court. All have reached the conclusion that the Act does not authorize such an order.[7] I think that should be the decision of the Court in this case.

The CHIEF JUSTICE and Mr. Justice JACKSON join in this dissent.

[6] See Notes 4 and 5, *supra*.

[7] I might well have contented myself, in lieu of writing, with a reference to the opinion in Western Union Tel. Co. *v.* N. L. R. B., 113 F. 2d 992, which exhaustively and convincingly deals with the subject.